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No. 95-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*,

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

MOTION OF THE FAMILY RESEARCH COUNCIL, OF THE PEOPLE FOUNDATION, AND FRIENDS OF ELIZABETH CURTIS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICI CURIAE*

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The Family Research Council, Of The People Foundation, and Friends of Elizabeth Curtis (collectively, the "Proposed *Amici*") hereby move, pursuant to Rule 37.2, for leave to file a brief *amici curiae* in support of the Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts (the "Petition"). The Petition seeks review of a Massachusetts state court decision upholding Respondents' program of dispensing condoms to unemancipated minors attending public schools, without requiring parental consent or permitting parents with objections to the condom program to opt out their minor children. The Petitioners have consented in writing to the filing of the brief *amici curiae*. The Respondents, whose written consent was also requested, have refused consent. In accordance with Rule 37.2, a copy of the brief *amici curiae* is attached to this motion.

Interest Of The Proposed *Amici*

As set forth more fully in the "Statement Of Interest" section of the attached brief, the Proposed *Amici* are three nonprofit, public interest organizations with a demonstrated interest in preserving the fundamental rights of parents to rear and educate their children in accord with their own reasonable values and religious beliefs. They include the Family Research Council (the "Council"), a national organization that serves as an advocate for traditional family values in the private and public sector, and Of The People Foundation (the "Foundation"), a national organization that conducts research on the status of parental rights and serves as a national information clearinghouse on parental rights. The Proposed *Amici* also include Friends of Elizabeth Curtis (the "Friends group"), a New York-based parents group comprised of William and Ignacia Alfonso, and William and

Joanne Gough, the prevailing petitioners in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). The *Alfonso* case is directly at odds with the Massachusetts Supreme Judicial Court decision, and the constitutional issues it determined are at the heart of the litigation between Petitioners and Respondents.

The Proposed *Amici* seek to bring their collective knowledge, experience and expertise in the area of parental rights to this action, and believe that the attached brief *amici curiae* will assist the Court in apprehending the threat to constitutionally-protected parental rights posed by the Massachusetts decision.

Desirability Of A Brief *Amici Curiae*

This case concerns questions of fundamental parental rights that extend far beyond the Falmouth County school district. At issue is whether the State, without a showing of a compelling interest, can use its compulsory school attendance laws to compel parents to send their minor children into an environment that the parents believe reasonably threatens their children's health and welfare. Here, that environment is a public school where children are being offered, without parental consent and over parental objections, contraceptive devices for the purpose of engaging in "safe sex."

The Proposed *Amici* submit that, absent a compelling state interest, Respondents' condom distribution program violates the petitioning parents' constitutionally-protected right to rear their children as they reasonably see fit. The attached brief explains this constitutional issue, which was misapprehended and summarily disregarded by the Massachusetts court. Accordingly, the Proposed *Amici* respectfully request leave of this Court to file the attached brief *amici curiae* in support of the Petition.

Respectfully submitted,

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The Family Research Council, Of The People Foundation, and Friends of Elizabeth Curtis (collectively, the "*Amici Curiae*") respectfully submit this brief *amici curiae* in support of the Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts (the "Petition").

STATEMENT OF INTEREST

The *Amici Curiae* are public interest organizations with knowledge, experience and expertise in the area of constitutionally-protected parental rights. They are committed to preserving and safeguarding the rights of parents to rear and educate their children in accord with their own reasonable

values and religious beliefs, without unreasonable and unnecessary infringement by governmental authorities and other policy-makers.

The Family Research Council (the "Council") is a national advocacy organization that is an expert on family and parental rights issues. Since 1981, the Council has played an active role in gathering and publishing data about the family, and promoting legislation and policies designed to strengthen the position of the family.

Of The People Foundation (the "Foundation") is also a national organization that is an expert on parental rights. Since 1993, the Foundation has served as a national information clearinghouse on parental rights, collecting and disseminating information on parental rights issues and the areas, such as public education, in which parental rights are being infringed.

Friends of Elizabeth Curtis (the "Friends group") is a parents group that has become expert on the subject of parental rights through personal experience. The Friends group is comprised of William and Ignacia Alfonso, and William and Joanne Gough, the parents who successfully challenged the New York City Board of Education's distribution of condoms to unemancipated minors without parental consent or a parental opt-out in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). Because the constitutional issues determined in *Alfonso* are at the center of this litigation and are, thus, at stake, the Friends group's interests are directly implicated by the decision of the Massachusetts Supreme Judicial Court.

ARGUMENT

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The constitutional importance of this case lies in a fact that was clearly misapprehended by the court below. The record amply demonstrates that the school-based condom program complained of by the petitioning parents is one which they reasonably believe is dangerous to their children's health and welfare. Nationwide, the evidence indicates that schools that make condoms available to students, more often than not, experience an increase in student sexual activity, pregnancies and sexually transmitted diseases.[1] Thus, the real issue in this case is whether the State, without a compelling interest, can use its mandatory school attendance laws to force parents to send their unemancipated minor children to a school that invites students to take part in such a program, without permitting parents to veto their children's participation based on reasonable concerns about the threat to their children's health and well-being. The issue is *not* about exposure of children to ideas and viewpoints that their parents find offensive or disagreeable.

This case poses an important federal question of substantive due process under the Fourteenth Amendment that has not been, but should be, settled by this Court. The state courts that have considered the issue have reached conflicting conclusions. At one end of the spectrum is the decision of the Massachusetts Supreme Judicial Court, which ruled that the

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[1] For example, a San Francisco high school that provided students with coupons redeemable for condoms achieved a significant increase in student condom usage, but experienced a 25 percent increase in female student sexual activity and pregnancy rates. Douglas Kirby, et al., *Six School-Based Clinics: Their Reproductive Health Services and Impact on Sexual Behavior*, Family Planning Perspectives, January/February 1991, pp. 11-12, 15.

respondent school district's condom availability program did not violate the petitioning parents' substantive due process rights under the Fourteenth Amendment, even though it denied them any opportunity to opt their children out of the program that was never shown to be supported by a compelling state interest. The Massachusetts court found that, even though the program was implemented in the compulsory setting of the public schools, it lacked the degree of coercion or compulsion required to show a burden on the petitioning parents' constitutional rights.

At the other end of the spectrum is *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), where a New York appellate court ruled that a similar condom distribution program impermissibly infringed the petitioning parents' due process rights. There the court found that the parents were being forced, without a compelling necessity therefor, to surrender their right to influence and guide the sexual activity of their minor children under the Fourteenth Amendment. The New York court found the fact that the condom program was implemented in the compulsory setting of the public schools to be determinative.

The decisions of the Massachusetts and New York courts as to the same constitutional issue are irreconcilable. Both courts reached their conclusion in purported reliance on the precedents of this Court, which have long recognized that parents possess a constitutionally-protected interest in rearing and educating their children in accord with their own views and religious beliefs. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 214, 232-33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). However, because these precedents do not address the precise questions that are presented by the Petition and that were present in *Alfonso*, the state of the law as to this important federal constitutional question of parental rights remains unsettled and in conflict.

Without this Court's resolution of the due process question, the interpretation of constitutionally-protected parental rights is likely to vary from state to state. In Pennsylvania, for example, parents are litigating with the Philadelphia school district over its implementation of a condom distribution program in public schools. That litigation is ongoing, although an appellate court recently recognized that the parents have a substantial and protectable interest in ensuring that their express parental consent is obtained prior to the commencement of a school condom distribution program. *See Parents United for Better Schools, Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 646 A.2d 689 (Pa. Commw. Ct. 1994). Related issues of parental rights in public education have also arisen in Georgia, where the parents of two teenage girls have sued school officials because a school counselor took the 14- and 15-year-old girls, without their parents' knowledge or consent, to a clinic that dispensed prescription oral contraceptives and condoms, and administered AIDS tests and pap smears. *Waymon F. Earls, et al. v. Stephens County Sch. Dist., et al.*, No. 2:95-CV-97-WCO (N.D. Ga. 1995). State and federal courts alike, thus, need clarification from this Court as to the scope of constitutionally-protected parental rights in this particularly sensitive area.

Amici Curiae submit that because parents have a fundamental right to rear their children in accord with their own views about health and sexual abstinence, they should also be held to have a corresponding right to opt their children out of a state-sponsored "safe sex" program that exposes their children to potential health risks -- when that program takes place in the compulsory setting of the public schools and the program is unsupported by a compelling state interest. Moreover, Respondents cannot avoid accountability to the parents by labeling students' participation in the program as "voluntary"; the issue here is not students' choice, but rather compulsion on parents to surrender their right to affirmatively guide and direct their children's choices and to prevent them from falling in harm's way. Public education should not require the sacrifice of such fundamental parental rights.

The bottom line is that school authorities do not have unfettered discretion to interfere in the parent-child relationship. Parents have rights, too, and when school authorities implement programs that threaten the health and welfare of minor children -- whether by making contraceptive devices available upon demand for "safe sex" or dispensing clean needles for "safer" intravenous drug use -- parents, at a constitutional minimum, must be permitted to just say no. The Massachusetts court failed to acknowledge this basic fundamental right, and has thereby created a dangerous precedent for usurping parental authority as to virtually any subject.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, the *Amici Curiae* respectfully urge this Court to grant the Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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